

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

In re:)
) 1999 OAL Determination No. 5
Request for Regulatory)
Determination filed by DAVID) [Docket No. 97-010]
DEAN RICHARDS regarding a)
rule issued by the) January 15, 1999
DEPARTMENT OF)
CORRECTIONS which denies) Determination Pursuant to
family visits to inmates) Government Code Section
designated Close A or Close) 11340.5; Title 1, California
B custody¹) Code of Regulations,
) Chapter 1, Article 3

Determination by: CHARLENE G. MATHIAS, Deputy Director

HERBERT F. BOLZ, Supervising Attorney
TAMARA PIERSON, Administrative Law Judge
on Special Assignment
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether the rule of the Department of Corrections denying family visits to certain inmates, is a "regulation" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

OAL has concluded that the challenged rule is a "regulation," which was a violation of the APA, but has since been duly promulgated pursuant to the APA.

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ISSUE

OAL has been requested to determine whether the California Department of Corrections ("Department" or "CDC") rule which denies family visits to inmates with custody designations of Close A or Close B, is a "regulation" required to be adopted pursuant to the APA.²

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF CORRECTIONS' QUASI-LEGISLATIVE ENACTMENTS?

Penal Code section 5058, subdivision (a), declares in part that:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations *shall be promulgated and filed pursuant to [the APA]*. . . . [Emphasis added.]"

Clearly, the APA generally applies to the Department's quasi-legislative enactments.³ Penal Code section 5058 was amended to include several express exemptions from APA rulemaking requirements [subdivisions (c) and (d)]. The applicability of these exemptions will be discussed below.

II. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,⁴ the California Court of Appeal upheld OAL's two-part test⁵ as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule meets both parts of the two-part test, OAL must conclude that it is a "regulation" and subject to the APA. In applying the two-part test, OAL is guided by the principle stated by the court in *Grier*:

". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the

view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]"⁶

A. IS THE CHALLENGED RULE A "STANDARD OF GENERAL APPLICATION?"

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.⁷

In this case the rule applies to all prisoners; statewide, who have custody designations of Close A or Close B. Prisoners with this custody designation are considered higher security risks and are housed in cells in areas designated and maintained for higher security needs. Since the entire class of such prisoners is affected by the challenged rule, the rule is a standard of general application.

B. DOES THE CHALLENGED RULE INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

Penal Code section 5058, subdivision (a), declares that:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons"

Penal Code section 5054 declares that:

"The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director [of the Department of Corrections]"

The challenged rule designates inmates with a particular type of custody designation as not being entitled to family visits. This rule implements the code

sections listed above, which provide the director of CDC the authority to manage the prisons and the responsibility for the custody and discipline of the inmates.

The challenged rule is a rule or standard of general application. In addition the challenged rule "implements" the law enforced by the Department. Since the challenged rule meets both parts of OAL's two-part test, *OAL concludes it is a "regulation."*

II. DOES THE CHALLENGED RULE , WHICH HAS BEEN FOUND TO BE A "REGULATION," FALL WITHIN ANY *SPECIAL* ⁸ EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

Penal Code section 5058, subdivision (c) and (d), added in 1995, provides for specific statutory exemptions, in particular situations, to the APA.

The Department does not contend any of the special exemptions applies in this case. OAL concurs.

III. DO ANY OF THE CHALLENGED SECTIONS FOUND TO BE "REGULATIONS" FALL WITHIN ANY *GENERAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.⁹ Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.¹⁰ In this case, the Department does not contend either the "internal management" exemption or the "forms" exemption to the APA applies to the challenged rule. OAL concurs.

IV. DOES THE CHALLENGED RULE, FOUND TO BE A “REGULATION,” VIOLATE THE APA?

The Department filed new subsection (e)(1)-(2), to Title 15, CCR, section 3174 as an emergency on February 27, 1995; operative May 30, 1995:

“(e) Family visiting is a privilege. Eligibility for family visiting will be limited by the assignment of the inmate to a work/training incentive group as outlined in section 3044. . . .

(2) Family visits shall not be permitted for inmates who are in any of the following categories: . . . designated Close A or Close B custody;”

The challenged rule was first issued as a revision to the Mule Creek Prison’s Operations Manual in January 1995. Accordingly, the rule was in violation of the APA from the time it was issued until the emergency regulation became operative in May 1995. There was also a lapse in the emergency regulation from May 23, 1996 to June 7, 1996, during which period the rule was an “underground regulation.”¹¹

However, with the exception of those periods of time, the challenged rule has been codified and does not now violate the APA.

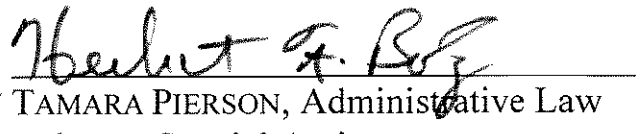
CONCLUSION

For the reasons set forth above, OAL finds that the rule which denies family visits to inmates with custody designations of Close A or Close B was an "underground regulation," which has since been adopted in compliance with the APA requirements; therefore, it is no longer in violation of the APA.

January 1, 1999


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ENDNOTES

1. This request for determination (dated May 28, 1995) was filed by David Dean Richards, while an inmate at Mule Creek State Prison, E-40024, C-11-147U, P.O. Box 409000, Ione, CA 95640. The agency response was filed by Pamela L. Smith-Steward, Deputy Director of Legal Affairs of the Department of Corrections, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001. (916) 485-0495.

2. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the *Administrative Procedure Act*." [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

3. The APA would apply to the Department's rulemaking even Penal Code section 5058 did not expressly so provide. The APA applies generally to state agencies, as defined in Government Code section 11000, in the executive branch of Government, as prescribed in Government Code section 11342, subdivision (a).
4. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. A 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite on a particular point, cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr. 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

The *Tidewater* court, in discussing which agency rules are subject to the APA, referred to “the two-part test of the Office of Administrative Law,” citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

5. The *Grier* Court stated:

“The OAL’s analysis set forth a two-part test: ‘First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency’s procedure?’ (1987 OAL Determination No. 10, *supra*, slip op’n., at p. 8.)

OAL’s wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

6. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

7. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

8. All state agency “regulations” are subject to the APA unless expressly exempted by statute. Government Code section 11346. Express statutory APA exemptions may be divided into two categories: special and general. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120,126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself). *Special* express statutory exemptions, such as Penal Code section 5058, subdivision (d)(1), which exempts Corrections’ pilot programs under specified conditions, typically: (1) apply only to a portion of one agency’s “regulations” and (2) are found in that agency’s enabling act. *General* express statutory exemptions, such as Government Code section 11342, subdivision (g), part of which exempts internal management regulations from the APA, typically apply across the board to all state agencies and are found in the APA.

9. Government Code section 11346.

10. The following provisions of law may permit rulemaking agencies to avoid the APA’s requirements under some circumstances:

- a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)
 - c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)
 - f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the idea that *City of San Joaquin* (cited above) was still good law.
11. Title 15, CCR, section 3174, subsection (e)(1)-(2) was filed February 27, 1995, as an emergency; operative May 30, 1995. A certificate of compliance was due to OAL by November 6, 1995. A new subsection (e)(1)-(2) and amendment was refiled November 7, 1995, as an emergency; operative November 7, 1995. A certificate of compliance was due by April 14, 1996. The certificate of compliance was disapproved by OAL and a repealer of subsections (e)(1) and (e)(2) was filed with the Secretary of State on May 23, 1996. This reinstated section 3174, as it existed prior to the emergency amendment which became operative May 30, 1995, pursuant to Government Code section 11349.6, subdivision (d). New subsection (e)(1) and (e)(2) were filed June 7, 1996, as an emergency; operative June 7, 1996. A certificate of compliance was due to OAL by October 7, 1996. The certificate of compliance was transmitted to OAL October 3, 1996, and filed November 18, 1996.